

**BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA**

DOCKET 2020-218-E

IN RE:

ALEX KADOSHNIKOV)	
Complainant/Petitioner,)	
)	
v.)	DUKE ENERGY CAROLINAS, LLC’S
)	MOTION TO STRIKE
)	
DUKE ENERGY CAROLINAS, LLC,)	
Defendant/Respondent.)	
_____)	

Pursuant to S.C. Code Ann. Regs 103-829(A), Duke Energy Carolinas, LLC (“DEC” or the “Company”) objects to and moves to strike, in its entirety, the “testimony” filed by Alex Kadoshnikov with the Public Service Commission of South Carolina (the “Commission”) on December 8, 2020. As discussed in detail below, the testimony is inadmissible and improper because it is replete with hearsay, improper lay opinion, and contains numerous statements that are more prejudicial than probative. The Company also requests that the Commission hold the testimony deadlines for all parties and the hearing in abeyance pending resolution of this motion.

The Company understands that *pro se* litigants may have difficulty in navigating proceedings before the Commission or in preparing testimony that conforms to the requirements of South Carolina law. In recognition of this, the Company proposes that the Commission issue a new procedural schedule in this proceeding to give Complainant an opportunity to file testimony that is admissible.

BACKGROUND

Alex Kadoshnikov filed a complaint in the above-referenced proceeding, which was docketed on September 3, 2020. The complaint makes vague health and safety allegations related

to smart meters, and states that Mr. Kadoshnikov is currently enrolled in the smart meter opt out program, but that he requires a bi-directional, non-communicating manual read meter be installed at his residence so that he can buy and sell electricity from Duke Energy. The Company filed an answer and motion to dismiss Mr. Kadoshnikov's complaint on October 2, 2020, on the basis that Complainant has failed to allege a violation of any applicable statute or regulation for which the Commission can grant relief, and pursuant to S.C. Code Ann. § 58-27-1990, a hearing in this case is not necessary in the public interest or for the protection of substantial rights. The Commission denied the Company's motion to dismiss via a directive issued on October 28, 2020, and the Commission has not yet issued a final order.

On November 4, 2020, the Company filed a letter in response to the Commission's directive and the Prefile Testimony Letter and Notice of Hearing issued on October 28, 2020. In the November 4th letter, the Company indicated it intended to seek reconsideration of the Commission's denial of the Company's motion to dismiss, once a final order is issued. DEC also requested that the testimony filing deadlines and hearing date be held in abeyance pending resolution of the motion for reconsideration. The Company also requested that if the filing deadlines were not held in abeyance, that the Clerk's Office set a new procedural schedule wherein the Complainant files testimony first.

Also on November 4, ORS filed a letter with the Commission regarding its investigation of Mr. Kadoshnikov's complaint. The letter states, "ORS also reviewed the Company's applicable tariff and determined a non-communicating bi-directional meter was not an option under a net metering rider. ORS found the Company in compliance with their [Commission] approved tariff." ORS also indicated it does not intend to submit prefiled testimony or attend the hearing scheduled in this matter.

The Clerk's Office subsequently issued a Rescheduled Notice of Hearing and Prefile Testimony Deadlines on November 5, 2020. Complainant's direct testimony was due to be filed by December 8, and the Company's direct testimony is due to be filed by December 22, 2020.

On December 8, 2020, Complainant filed with the Commission over 800 pages of materials purporting to be "testimony and exhibits." The purported "testimony" is comprised of the following:

- Quotes, excerpts, and screenshots from websites and parties other than Complainant;
- A variety of online articles;
- Purported lab test results of unnamed individuals;
- A 416-page article entitled "Irradiated" by an unknown author;
- Other statements and materials that do not constitute admissible testimony.

ARGUMENT

Mr. Kadoshnikov's purported "testimony" is inadmissible and improper because it includes material that is entirely outside the scope of prefiled testimony. Mr. Kadoshnikov's filing is replete with hearsay, improper lay opinion, contains numerous statements that are more prejudicial than probative, and addresses matters not at issue in the filed complaint. For these reasons, Mr. Kadoshnikov's "testimony" is inadmissible and should be stricken.

A. A lay witness may offer testimony only as to matters within his or her personal knowledge.

As an initial matter, the materials filed by Mr. Kadoshnikov are inadmissible because the Complainant has not established that he has personal knowledge of any of the subjects discussed in his nearly 900-page filing, which includes, among other items, declarations from utility customers in other jurisdictions regarding smart meters, lab reports, and screenshots and text from

a variety of websites. Commission regulations provide that “[t]he rules of evidence as applied in civil cases in the Court of Common Pleas shall be followed.” S.C. Code Ann. Regs. 103-846(A). Prefiled testimony therefore is subject to Rule 602 of the South Carolina Rules of Evidence (“SCRE”), which provides, in part, that “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Rule 602 “embodies one of the most fundamental tenets of a rational system of evidence law; testimony should be reliable and, thus, must be based on the perceptions of the witness rather than conjecture or second-hand information.” Charles A. Wright & Victor J. Gold, 27 Fed. Prac. & Proc. Evid. § 6021 (2d ed.). See also 1 McCormick On Evid. § 10 (7th ed.) (“The burden of laying a foundation by showing that the witness had an adequate opportunity to observe is upon the party offering the testimony.”). Mr. Kadoshnikov has not established that he has any personal knowledge of any of the subjects discussed in his filing, and as such, the materials that were filed are inadmissible in this proceeding.

B. A lay witness may not offer testimony that is not based on his or her personal perceptions or observations.

The Company also submits that Mr. Kadoshnikov’s testimony is inadmissible under Rule 701, SCRE, which provides as follows:

If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience, or training.

The materials filed by Mr. Kadoshnikov are inadmissible because they do not contain his personal perceptions or observations, rather, they contain the perceptions of others, which Mr. Kadoshnikov has seemingly adopted. See *State v. Westmoreland*, 421 S.C. 410, 419 (Ct. App. 2017) (“Clevenger’s opinion . . . was not based on his perceptions or observations but instead was

based on his review of the perceptions of others. As a result, his testimony as a lay witness was improper opinion testimony under Rule 701(a).”). Because Mr. Kadoshnikov is a lay witness and not testifying as an expert, any opinion testimony he offers must be based upon his own personal observations and not merely upon the statements of others. *State v. Bottoms*, 260 S.C. 187, 195 S.E.2d 116 (1973).

C. Witnesses may not offer hearsay testimony, i.e., statements made by other declarants offered to support or prove the truth of the matter asserted.

Further, the testimony filed by Mr. Kadoshnikov contains a myriad of statements made by declarants other than Mr. Kadoshnikov outside of this proceeding, and as such, those statements constitute inadmissible hearsay under Rules 801 and 802, SCRE. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Rule 801(c), SCRE. Admission of any of these statements contained in the declarations, lab reports, and online articles, which were made by declarants other than Mr. Kadoshnikov, would unfairly prejudice the Company because the Company will not have the opportunity to cross-examine or elicit explanatory testimony from the original declarants. *See Cooper Corp. v. Jeffcoat*, 217 S.C. 489, 494, 61 S.E.2d 53, 55 (1950) (“Probably the most important objection to admitting hearsay testimony in evidence is that the declarant is not present and available for cross-examination. The exercise of the right to cross-examine the witness of the adverse party is regard as, and is in fact, essential in the administration of justice to discovery the falsity of testimony and prevent the admission of perjured testimony.”).

D. A witness’s testimony cannot include statements that are more prejudicial than probative.

Mr. Kadoshnikov’s testimony contains numerous statements that are undoubtedly more prejudicial than probative, and as such, these statements are inadmissible pursuant to Rule 403,

SCRE. Rule 403 provides as follows: “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” On the very first page of his testimony, the Complainant compares his situation “to the Auschwitz concentration camp sitting in a gas chamber” On page 8 of the same file, Complainant compares the deployment of smart meters to the conditions of North Korea. On page 20, Complainant makes a comparison to Nazi Germany. On page 37, Complainant makes a comparison to sexual assault. These types of statements have absolutely no evidentiary or probative value and are unfairly prejudicial.

E. A witness’s testimony must be relevant to the issues raised in the complaint.

Rule 402 SCRE, states that “[e]vidence which is not relevant is not admissible.” Rule 401, SCRE, defines “relevant evidence” to mean “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The text of the “Concise Statement of Facts/Complaint” portion of the Complaint filed in this case is as follows:

I am currently in the smart meter opt out program (thank you for allowing customers that are concerned about RF radiation to have this option). To buy or sell electricity from Duke Energy I will have to get a bidirectional meter installed on my residence. I have already spoke with Office of Regulatory Staff, Duke Energy & Sunpro.

The text of the “Relief Requested” in the Complaint in this case is as follows:

I am concerned for my families [sic] health & safety and am asking the Public Service Commission to allow me to have a noncommunicating manual read meter installed on my residence. I am fine with a telephone connection from Windstream or Charter to be connected and send usage to Duke. Another option is to have meter installed on my pole and tied in their [sic] instead of at my residence. There are many ways of making this safe. I am asking for this to take place. Thank you, Alex.

These are the issues at bar in this proceeding, and any discussion in testimony not bearing on facts that are “of consequence to the determination” of these matters is inadmissible as irrelevant.

CONCLUSION

For the reasons explained above, DEC objects to and moves to strike the testimony filed by the Complainant.

WHEREFORE, DEC moves the Commission to strike Complainant’s testimony in its entirety, requests that the Commission hold the testimony deadlines for all parties and the hearing in abeyance pending resolution of this motion; and requests such other relief as the Commission deems just and proper.

Respectfully submitted this 18th day of December, 2020.

s/ Katie M. Brown

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